RECORD AND BRIEFS

Supreme Court, U.S.
FILED
APR 18 2016
OFFICE OF THE CLERK

No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WORLD VISION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EUGENE VOLOKH
Counsel of Record
SCOTT & CYAN BANISTER
AMICUS BRIEF CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

Library of Congress

QUESTION PRESENTED

Whether it is consistent with the Establishment Clause to let a day care center operated by a church get state funds for resurfacing its playground under an evenhanded and neutral aid program.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. This Court Should Adopt the Conclusion of the *Mitchell* v. *Helms* Plurality: Evenhanded Aid Does Not Violate the Establishment Clause 4

II. Even Under the *Mitchell* v. *Helms* Concurrence, Trinity Church Is Not Barred from Receiving Grant Aid 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Agostini v. *Felton*, 521 U.S. 203 (1997) 10

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 1, 4

Comm. for Pub. Educ. & Religious Liberty v. *Regan*, 444 U.S. 646 (1980) 10, 11

Everson v. *Bd. of Educ.*, 330 U.S. 1 (1947) 5, 7, 8

Hunt v. *McNair*, 413 U.S. 734 (1973) 10

Mitchell v. *Helms*, 530 U.S. 793 (2000) ..... passim

Tilton v. *Richardson*, 403 U.S. 672 (1971) 11

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 5, 10

Other Authorities

Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013) 6

Kevin Penton, *FEMA Denies Aid to Religious Groups Hit by Sandy*, USA Today, July 25, 2013 6

Laura Vozzella, *Aftermath Gives New Confidence to Oklahomans*, J. Rec. (Okla. City), Apr. 19, 1996 7

Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143, Mo. Dep't of Nat. Resources (Nov. 2015), http://dnr.mo.gov/pubs/pub2425.pdf 8, 9

Public Assistance Sandy Success Stories, FEMA, https://www.fema.gov/public-assistance-sandy-success-stories (last updated Nov. 12, 2015) 6

Robert Pear, *House Approves Storm Aid for Religious Institutions*, N.Y. Times, Feb. 18, 2013 6

Constitutional Provisions

Wash. Const. art. I, § 11 1

INTEREST OF THE *AMICUS CURIAE*[1]

Since 1950, World Vision has been a Christian humanitarian organization dedicated to working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. World Vision has a direct and substantial interest in the outcome of this case, as it competes for federal grants and has its headquarters in the State of Washington, whose state constitution contains a "Blaine Amendment."[2] World Vision is concerned that the decision below authorizes discrimination against religious institutions; and if the decision below is not corrected, such discrimination could extend far outside the narrow program involved in this case.

SUMMARY OF ARGUMENT

Trinity Lutheran correctly argues that Missouri's discrimination against religious institutions in the Scrap Tire Program should be subjected to strict scrutiny under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). But this still

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

[2] "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Wash. Const. art. I, § 11.

leaves open the question whether the exclusion should pass strict scrutiny on the theory that (1) Missouri has a compelling interest in complying with the Establishment Clause, and (2) providing playground resurfacing grants to religious preschools would violate the Establishment Clause. This brief argues that the answer to this question is "no": allowing religious institutions equal access to Scrap Tire Program grants would not violate the Establishment Clause.

1. This Court ought to conclude that the Establishment Clause is not violated when religious organizations receive government funds under a neutral and evenhanded funding program. This rule, adopted by the plurality in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), is a sensible device for dealing with the many government aid programs that exist today. As this case illustrates, reading the Establishment Clause to exclude religious organizations from such aid programs would wrongly deny the organizations equal access to the resources needed to protect the health and safety of their congregants (as well as of the general public who may use their facilities).

If the government reimbursed day care centers for removing potentially cancer-causing asbestos, or hired security guards for all day care centers in an attempt to prevent mass shootings, government funds would be going directly to improving health and safety. Distributed evenly to religious and secular organizations alike, these government funds would equally benefit all people. As a result, no one should conclude that these evenhanded health and safety programs would raise any Establishment Clause concerns.

Similarly, in this case, Missouri government funds are going to religious and secular nonprofit organizations to make playground surfaces safer. By protecting children from the hard, jagged edges of the gravel currently used in many playgrounds, resurfacing grants help improve the health and safety of both the day care children and the other neighborhood children who use these playground facilities. Such an evenhanded funding program that aims to protect the health and safety of young children around the state should not raise any Establishment Clause concerns.

2. Even if this Court decides this case under Justice O'Connor's and Justice Breyer's concurrence in *Mitchell* v. *Helms*, providing a grant to Trinity Lutheran would not violate the Establishment Clause. Grant funding under the Scrap Tire Program would not be divertible for use for religious purposes.

The aid in this case—reimbursement for installing a rubber playground surface—would only help protect children who fall down while playing on the playground. Most religious services are held indoors, not on playgrounds. But even the rare services held outdoors on a playground do not materially benefit from the rubberized surface. No religious service with which *amicus* is familiar involves children chasing each other on the playground, hanging from the monkey bars, or doing other things that benefit from the greater safety produced by rubberized playground surfaces. Rubberized surfaces protect children's health during secular play; they do not enable religious worship.

ARGUMENT

Trinity Lutheran's brief persuasively argues that, under *Lukumi Babalu*, exclusion of religious institutions from the Scrap Tire Program precisely because of their religiosity presumptively violates the Free Exercise Clause. This presumption can only be overcome by showing that the discrimination against religion is narrowly tailored to a compelling government interest. But while there is a compelling government interest in preventing violation of the Establishment Clause, excluding religious institutions is not narrowly tailored to that interest: including such institutions on the same terms as other institutions would be entirely consistent with the Establishment Clause.

I. This Court Should Adopt the Conclusion of the *Mitchell* v. *Helms* Plurality: Evenhanded Aid Does Not Violate the Establishment Clause

The *Mitchell* plurality concluded that if "the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose," then "any aid going to a religious recipient only has the effect of furthering that secular purpose." *Mitchell*, 530 U.S. at 810 (plurality opinion). Because the aid in *Mitchell* was made available to a "broad array of schools . . . without regard to their religious affiliation or lack thereof," the aid did not violate the Establishment Clause. *Id.* at 830.

In so concluding, the *Mitchell* plurality relied on a long line of this Court's precedents allowing reli-

gious institutions to benefit from neutral, evenhanded aid programs. *See id.* at 829. "[N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Id.* Similarly, in *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 8 (1993), this Court explained that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."

Indeed, this Court's first modern Establishment Clause case stressed that a state should not be forbidden "from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). The Court in *Everson* noted that the First Amendment should not be construed to mandate denying state-funded "police and fire protection, connections for sewage disposal, public highways and sidewalks" to church-run schools. *Id.* at 17-18. Likewise, the First Amendment does not compel a state to exclude a religious day care center from a similar state-funded benefit "so separate and so indisputably marked off from the religious function" of this institution. *Id.* at 18. The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.*

Distributing evenhanded aid to religious and secular organizations alike makes all the more sense in today's modern welfare state. Government funds

routinely go to help organizations improve the health and safety of their facilities, and religious institutions and their patrons should not be excluded from such help.

For instance, in the wake of Hurricane Sandy—the most destructive hurricane of the 2012 Atlantic hurricane season—the House of Representatives approved Federal Emergency Management Agency grants to help repair affected buildings, including houses of worship.[3] As the House of Representatives recognized, excluding churches, synagogues, mosques, and temples from receiving these funds would have unconscionably discriminated against religion.[4] Though FEMA appeared reluctant to provide even existing recovery funds to religious groups,[5] some funds ultimately did go to help restore electricity and housing at some religious institutions.[6] When natural disasters ravage a community, the govern-

---

[3] Robert Pear, *House Approves Storm Aid for Religious Institutions*, N.Y. Times, Feb. 18, 2013.

[4] *Id.* ("To deny disaster relief to houses of worship devastated by the storm 'would be to discriminate against them because they are religious institutions,' [Representative Grace] Meng said."); Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013).

[5] Kevin Penton, *FEMA Denies Aid to Religious Groups Hit by Sandy*, USA Today, July 25, 2013.

[6] *Public Assistance Sandy Success Stories*, FEMA, https://www.fema.gov/public-assistance-sandy-success-stories (last updated Nov. 12, 2015) (reporting on aid to St. John's University, a Catholic college).

ment should be free to help all community institutions recover.

Likewise, following the Oklahoma City bombing, Congress provided funding to help nonprofit organizations rebuild from the blast. A church located near the bombed federal building sought "$12,000 from the Federal Emergency Management Agency to cover uninsured damages caused after the blast, when rescuers placed bloody bodies on the carpeted church floor and pitched tents in its newly resurfaced parking lot."[7] FEMA at first "refused by saying the aid would violate the constitutional separation of church and state," but later changed its mind under pressure from members of the Oklahoma Congressional delegation.[8] Holding that churches could not receive even-handed reconstruction aid would have left the church damaged—and damaged as a result of its willingness to help—while letting its next-door neighbor rebuild.

Likewise, if the government provides funding to stop the spread of the Ebola or Zika viruses, it should not be required to exclude religious organizations from receiving the funds. If, as the Court in *Everson* noted, the First Amendment does not mandate the denial of state-funded police and fire protection aimed at protecting citizens' health and safety, it should not deny any religious organization funding aimed at eradicating diseases, while permitting all

---

[7] Laura Vozzella, *Aftermath Gives New Confidence to Oklahomans*, J. Rec. (Okla. City), Apr. 19, 1996.

[8] *Id.*

secular organizations to do so. *See Everson*, 330 U.S. at 17-18.

Missouri's Scrap Tire Program was the very sort of evenhanded program that the *Mitchell* plurality contemplated. It was open to playgrounds operated by religious and secular organizations alike. Indeed, thirteen recipients of the grant—all except Trinity Lutheran—were secular. And the criteria used to select grant recipients were neutral and secular, such as:

(1) whether the "[p]roject uses 100 percent scrap tires generated in Missouri" or "more than 40 percent scrap tires";

(2) whether the "project uses mats/tiles or pour-in-place surface material" or "loose surface material";

(3) whether the proposal includes three or more scrap tire material vendor quotes;

(4) whether the project has a realistic timeline; and

(5) whether the "school district's student population poverty percentage is greater than 75%."[9]

None of the criteria refers to religion, or even substantially opens the door to possible religious discrimination. Allowing churches to participate in this

---

[9] *Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143*, Mo. Dep't of Nat. Resources (Nov. 2015), http://dnr.mo.gov/pubs/pub2425.pdf [hereinafter *Application Instructions*].

program would thus not have violated the Establishment Clause.

II. Even Under the *Mitchell* v. *Helms* Concurrence, Trinity Church Is Not Barred from Receiving Grant Aid

Justice O'Connor's concurrence in *Mitchell*, joined by Justice Breyer, concluded that the even-handed funding in *Mitchell* was constitutional because the plaintiffs had not proven that the even-handedly allocated aid had been, was being, or was likely to be "used for religious purposes." *Mitchell*, 530 U.S. at 857, 867. "Regardless of whether these factors are constitutional requirements," the concurrence concluded, "they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion." *Id.* And the same is true of the Scrap Tire Program.

Under the Program, any grant recipient must first pay for the resurfacing out of pocket.[10] After that, the recipient may ask for reimbursement, but "solely for the purchase, vendor installation and delivery of playground scrap tire surface material."[11] Recipients are "reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved."[12]

---

[10] *Application Instructions*, *supra* note 9.

[11] *Id.*

[12] *Id.*

And this reimbursement is unrelated to advancing religious worship. Most religious services are held indoors, not on a playground. The few held outdoors do not involve the activities for which rubberized surfaces are installed: children chasing each other on the playground or hanging from monkey bars. An outdoor service on a rubberized playground could just as effectively have been held on grass, gravel, or any other playground surface. The government funds would thus not be used for indoctrination or religious teachings.

Of course, like all aid, playground recipient grants might "free up" the recipient's resources to be used for religious purposes, or might make the recipient more attractive to families who are looking for a preschool for their children. But this Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 658 (1980) (quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)).

The question instead is whether the government "aid in question actually is, or has been, used for religious purposes." *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring in the judgment) (upholding grants of instructional materials); *see also Zobrest*, 509 U.S. at 13-14 (upholding the government's decision to assist sectarian schools by providing interpreters to deaf students because the spending on the interpreter did not constitute spending on religious indoctrination); *Agostini* v. *Felton*, 521 U.S. 203 (1997) (upholding the government's program of providing supplementary secular instruction at religious schools because it did

not further religious indoctrination). The Scrap Tire Program assures that aid will not be used for religious purposes, or any purposes other than playground resurfacing. *See Regan*, 444 U.S. at 662 (holding that New York's reimbursement policy sufficiently ensured that sectarian schools were using funds for the costs of secular testing). Program funds are used to help protect children from physical injury, not to spread religious teachings.

For these reasons, this Court's decision in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), does not support the conclusion that such a grant program is unconstitutional. In *Tilton*, this Court held that providing federal construction grants to religiously-affiliated colleges and universities for construction of secular facilities did not violate the Establishment Clause. *Id.* at 683-89. But this Court held that allowing grant recipients to start using the grant-financed facilities for religious purposes after 20 years was unconstitutional. *Id.* at 683-84.

Here, though, the reimbursement for installing scrap tire material does not create any new facility that could be used to advance religious interests, and does not make the existing facility (the playground) more suited for religious worship. Thus, grant aid will not have the "effect of advancing religion" that this Court rejected in *Tilton*. *Id.* at 683.

CONCLUSION

There is thus no Establishment Clause barrier to Trinity Lutheran receiving funds from Missouri's Scrap Tire Program, whether this Court adopts the view of the *Mitchell* plurality or of the concurrence.

Respectfully submitted,

EUGENE VOLOKH
Counsel of Record
SCOTT & CYAN BANISTER
AMICUS BRIEF CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae